No. 4077

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GUSTAVE JOHNSON,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

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I.

STATEMENT OF THE CASE.

The plaintiff in error is accused by indictment wherein it is charged that on or about the 23rd day of March, 1923, at the City and County of San Francisco, in the Southern Division of the Northern District of California, he and Ray Croxall

> "then and there being, did then and there violate a requirement of the Act of December 17, 1914, as amended February 24, 1919, in that they did knowingly, wilfully, unlawfully, and feloniously have in their possession a certain preparation and derivative of opium, to-wit, one can morphine and one finger stall containing approximately a total of 194 grains of

> morphine, said defendants then and there being persons required to register and pay a tax under the provisions of the Act aforesaid as amended, and said defendants not then and there having registered under the provisions of the said Act, and not then and there having paid the special tax provided for by the aforesaid Act on the said morphine. Against the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided." (Trans. Rec. pages 3 and 4.)

The indictment was presented and filed on the 27th day of March, 1923. To the indictment, the plaintiff in error interposed a demurrer (Trans. Rec. pages 7, 8 and 9), which said demurrer was ordered overruled by the Court. (Trans. Rec. pages 9 and 10.) The plaintiff in error pleaded not guilty to the indictment (Trans. Rec. page 6) and the defendant, Ray Croxall, pleaded guilty to said indictment.

On the 20th day of April, 1923, the plaintiff in error was tried before a jury and the jury returned a verdict on said day finding the plaintiff in error guilty of the charge set forth in the indictment. Said verdict was as follows:

> "We, the jury, find as to the defendant at the bar as follows: Gustave Johnson, guilty, as charged." (Trans. Rec. page 15.)

Thereafter, on the 28th day of April, 1923, plaintiff in error interposed a motion for a new trial;

also a motion in arrest of judgment, each of which were by the Court denied. (Trans. Rec. pages 16, 17, 18, 19 and 20.) Whereupon the Court sentenced the plaintiff in error to three (3) years and six (6) months imprisonment in the United States Penitentiary at McNeil Island, State of Washington, and the defendant, Croxall, was sentenced to six (6) months imprisonment in the County Jail, County of San Francisco, State of California. (Trans. Rec. page 20.) A writ of error was thereupon sued out by the defendant to review the judgment and proceedings of the trial Court.

II.

SPECIFICATIONS OF THE ERRORS RELIED UPON.

1. The Court erred in overruling the demurrer to the indictment interposed by the plaintiff in error, the demurrer specifying particularly,

(a) That the indictment does not state facts sufficient to constitute an offensive against the laws of the United States and particularly against the provisions of the Act of December 17, 1914, as amended February 24, 1919.

(b) That said indictment is uncertain in that it can not be ascertained therefrom how defendants were persons required to register and pay a tax under the provisions of the Act of December 17, 1914, as amended February 24, 1919.

(c) That said indictment is uncertain because it can not be ascertained therefrom whether the defendants are charged as being dealers in narcotics and required to register or whether they obtained the narcotics above mentioned from a registered dealer in pursuance of a prescription written for the legitimate medical use of defendants.

(d) That the said indictment is uncertain in that it can not be ascertained therefrom why the defendants, or either of them, were persons required to pay the special tax provided for by the aforesaid Act on the said morphine.

(e) That said indictment is uncertain in that it can not be ascertained therefrom whether the defendants had joint possession of the narcotics mentioned in the indictment or whether one defendant had possession of one can of morphine and the other defendant had possession of the finger stall containing the morphine mentioned in said indictment.

(f) That said indictment is uncertain in that it can not be ascertained therefrom whether the defendants, or either of them, are charged with possessing the narcotics mentioned in said indictment at the same time.

(g) That said indictment is uncertain in that it can not be ascertained therefrom whether the Government charges one offense against the defendants or whether the Government is attempting to charge the defendants with two offenses in one count.

(h) That said indictment is uncertain in that it can not be ascertained therefrom what connection, if any, the defendants had with each other, whether one was the agent of the other, or whether each was acting independent of the other, or whether they were acting under a partnership agreement.

To which ruling overruling said demurrer, the plaintiff in error, duly excepted.

2. The Court erred in denying the motion of plaintiff in error for a directed verdict of not guilty upon the ground that the evidence is insufficient to convict the defendant. To which ruling, the plaintiff in error duly excepted.

3. The Court erred in denying the motion of plaintiff in error for a directed verdict of not guilty upon the ground that the indictment did not state any public offense. To which ruling, the plaintiff in error duly excepted.

4. The Court erred in denying the motion of plaintiff in error for a directed verdict of not guilty upon the ground that the evidence was insufficient to substantiate the charge that the defendant possessed a finger stall of morphine. To which ruling, the plaintiff in error duly excepted.

5. The Court erred in refusing to give the following instruction requested by plaintiff in error:

> "You are instructed that if you find from the evidence that the defendant, Gustave Johnson, was merely a consumer, a user, or an addict to the use of narcotics and had the narcotics men-

tioned in the indictment in his possession for his own use, and did not import, manufacture, produce, compound, sell, deal in, dispense or give away opium, or coca leaves, or any compound, manufacture, salt, derivative, or preparation thereof, then he was a person not required to register under the provisions of the Act and you must return a verdict of 'Not Guilty'."

To the Court's refusal to give such instruction, plaintiff in error duly excepted.

6. The Court erred in refusing to give the following instruction requested by plaintiff in error:

"You are instructed that there is no presumption of law created in the Act of December 17, 1914, as amended February 24, 1919, which is superior to or overcomes the presumption of innocence with which the defendant is clothed from the time of his arrest to the end of the jury's deliberations."

To the Court's refusal to give such instruction, plaintiff in error duly excepted.

7. The Court erred in refusing to give the following instruction requested by the plaintiff in error:

"It is not necessary under any law for the defendant to prove his innocence but the burden rests upon the prosecution to establish every element of the crime with which he is charged and every element of the crime must be established to a moral certainty and beyond all reasonable doubt. If the prosecution failed to establish to a moral certainty that the de-

fendant was a person required to register and did not register under the provisions of the Act for the possession of the narcotics mentioned in the indictment, then it is your duty to acquit the defendant. If the prosecution failed to establish to a moral certainty and beyond all reasonable doubt that the defendant had not paid the tax required for the possession of the said narcotics, then it is your duty to acquit the defendant."

To the Court's refusal to give such instruction, plaintiff in error duly excepted.

8. The Court erred in denying the motion in arrest of judgment on behalf of the plaintiff in error, in this,

(a) That the information on file does not charge or state facts sufficient to constitute a public offense under the laws of the United States against this defendant.

(b) That said indictment improperly includes two offenses without alleging same in separate counts.

(c) That this Court has no jurisdiction to pass judgment upon the defendant by reason of the fact that said indictment on file herein does not state a public offense under the laws of the United States.

To which ruling, the plaintiff in error duly excepted.

III.

ARGUMENT.

1.

NO CRIME IS SET FORTH IN THE INDICTMENT.

The indictment does not state facts sufficient in law to constitute a crime or public offense against the United States. This point is raised by the demurrer interposed by the plaintiff in error on file in the cause, which was ordered overruled and to which an assignment of error was duly made. (Trans. Rec. pages 65 and 66.) It is raised by plaintiff in error's request for binding instructions or motion for a directed verdict of not guilty made at the conclusion of the taking of testimony in the cause, to which an assignment of error was duly made. (Trans. Rec. pages 50 and 68.) It was also made by plaintiff in error before judgment by his motion in arrest of judgment, to which an assignment of error was also made. (Trans. Rec. pages 70 and 71.)

The indictment contains but one count which alleges that,

> "Gustave Johnson and Roy Croxall, hereinafter called the defendants, heretofore, to-wit, on or about March 23, 1923, at the City and County of San Francisco, and within the Southern Division of the Northern District of California, then and there being did then and there violate a requirement of the Act of December 17, 1914, as amended February 24, 1919, in that they did knowingly, wilfully, unlawfully and

feloniously have in their possession a certain preparation and derivative of opium, to-wit: one can morphine and one finger stall containing approximately a total of 194 grains of morphine said defendants then and there being persons required to register and pay a tax under the provisions of the Act aforesaid as amended, and said defendants not then and there having registered under the provisions of the said Act, and not then and there having paid the special tax provided for by the aforesaid Act on the said morphine. Against the peace and dignity of the United States of America, and contrary to the form of the Statute of the said United States of America in such case made and provided."

The indictment is defective for the reason that it fails to show that plaintiff in error is one of the class required by Section I of the Act above specified to register and pay a tax. The first clause of Section I of the Act of Congress of February 24, 1919, as also the Act of December 17, 1914, is, as follows:

"That on or before July 1st of each year, every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, or gives away opium or coca leaves, or any compound, manufacture, salt, derivative, or preparation thereof, shall register with the Collector of Internal Revenue of the district his name or style, place of business and place or places where such business is to be carried on, and pay the special taxes hereinafter provided:"

Barnes' Fed. Code (Suppl. 1921), p. 174;

Barnes' Fed. Code (1919), pp. 1328, etc.;

Sec. ~~138~~ 1-39; *U. S. Statutes at Large*, p. 785.

Section 8 of the Act of December 17, 1914, provides:

> "That it shall be unlawful for any person not registered under the provisions of this Act, and who has not paid the special tax provided for by this Act to have in his possession or under his control any of the aforesaid drugs; and such possession or control shall be presumptive evidence of a violation of this section and also of a violation of the provisions of this Act."

Certain exceptions are therein made and section continues, as follows:

> "provided further, that it shall not be necessary to negative any of the aforesaid exemptions in any complaint, information, indictment, or other writ or proceeding laid or brought under this Act; and the burden of proof of any such exemption shall be upon the defendant."

Sec. 8. 38 U. S. *Statutes at Large,* pp. 785-790;

Barnes' Fed. Code (1919), pp. 1328-1332.

Section 9 of the Act of December 17, 1914, prescribes the penalty:

> "That any person who violates or fails to comply with any of the requirements of this Act shall, on conviction, be fined not more than $2,000 or be imprisoned not more than five years, or both, in the discretion of the Court."

Sec. 9. 38 U. S. *Statutes at Large,* pp. 785-790;

Barnes' Fed. Code (1919), pp. 1328-1332.

Section I of the Act of December 17, 1914, is designated as Section 5452 of Barnes' Federal Code; Section 8 as 5459 and Section 9 as 5460. The Act of February 24, 1919, amended Sections 5452 and 5457 as set forth in said Code, which are Sections 1 and 6 of 38 U. S. Statutes at Large, but left Sections 5459 and 5460 undisturbed.. In other words, Sections 8 and 9 of the "Harrison Anti-Narcotic Act" as amended are the original sections of the Act of December 17, 1914. There are additional requirements in Section I of the Act as amended, new crimes set forth, for which the same penalty set forth in Section 9 of the Act of December 17, 1914, is prescribed, but in other respects Section I in the Act as amended is not materially different from the original Act.

The indictment does not allege that the defendant is an importer, manufacturer, producer, compounder, seller, dealer in, dispenser or a giver away of opium or coca leaves or any compound, manufacture, salt, derivative or preparation thereof, *but indulges in the bald conclusion of law that he is a person required to register and pay a tax.*

It has been held that Section 8 of the original "Harrison Anti-Narcotic Act" applies only to those persons specified in the first clause of the first section of said Act and it has also been held that

Section 8 of the Act as amended applies only to the same class.

United States v. Jin Fuey Moy, 241 U. S. 394 to 402;

Pendleton v. United States, 290 Fed. 388, 389;

United States v. Wilson, 225 Fed. 82 to 84;

United States v. Woods, 224 Fed. 278 to 280.

"It may be assumed that the statute has a moral end as well as revenue in view, but we are of the opinion that the District Court in treating those ends as to be reached only through a revenue measure and within the limits of a revenue measure was right."

"Approaching the issue from this point of view we conclude that 'any person not registered' in Section 8 can not be taken to mean any person in the United States, but must be taken to refer to the class with which the statute undertakes to deal, the persons who are required to register by Section I."

U. S. v. Jin Fuey Moy, 241 U. S. at page 402.

"The one (the count referred to) upon which he was convicted in substance alleged that, while he was a practicing physician and a person required to register under the 'Harrison Anti-Narcotic Act' (Compl. St. Secs. 6287-g-6287-q) he had in his possession 2.31 grains of morphine, although he had never registered. Quite clearly, this count charged no offense. It did not attempt to set up any violations of Sections 1006 et. seq. of the Revenue Act of February 24, 1919, 40 Stat. 1130 (Comp. St. Ann. Supp. 1919, 6287 g). It was obviously drawn under the original Anti-Narcotic Act (38 Stat. 785) which

> the Supreme Court years ago held did not penalize the mere possession of narcotics. U. S. v. Jin Fuey Moy, 241 U. S. 394, 36 Sup. Ct. 658, 60 L. Ed. 1061, Ann. Cas. 1917 D. 854. The count gains no added strength from the allegation that the defendant was a practicing physician. As such he was not required to register unless he dispensed narcotics."
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> *Pendleton v. U. S.*, 290 Fed. 388;
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> Advance Sheets Vol. 290 Fed. No. 2, p. 388, September 20, 1923.

According to these authorities, plaintiff in error is not within the provisions of Section 8 of the Act because he was merely in possession of the narcotics and had not registered and paid the special tax, by adding the conclusion of law that he was required to register. The Sixth Amendment to the United States Constitution provides

> *"In all criminal prosecutions the accused shall enjoy the right to be informed of the nature and the cause of the accusation."*

To say that he was a person required to register did not inform him of the nature of the cause of the accusation.

Plaintiff in error demanded additional information upon the subject under discussion in subdivisions 2, 3 and 4 of his demurrer (Trans. Rec. pages 7 and 8, 65 and 66), which were:

> 2. "That said indictment is uncertain in that it can not be ascertained therefrom how defendants were persons required to register and pay

a tax under the provisions of the Act of December 17, 1914, as amended February 24, 1919."

3. "That said indictment is uncertain because it can not be ascertained therefrom whether the defendants are charged as being dealers in narcotics and required to register or whether they obtained the narcotics above mentioned from a registered dealer in pursuance of a prescription written for the legitimate medical use of defendants."

4. "That the said indictment is uncertain in that it can not be ascertained therefrom why the defendants, or either of them, were persons required to pay the special tax provided for by the aforesaid Act on the said morphine."

Plaintiff in error was entitled to know from the indictment whether he was accused as an importer, manufacturer, producer, compounder, seller, dealer in, dispenser or giver away of the narcotics mentioned in the indictment in order to prepare his defense and to save him from possible double jeopardy. This information was denied the defendant and we respectfully submit that the lower Court erred in so doing.

The indictment should have particularly designated, when the plaintiff in error demanded it, to which one of the class of those required to register, he belonged. The conclusion of law that he was a person required to register is too vague and uncertain and as such it is insufficient.

"Offenses created by statute as well as offenses at common law, must be accurately and clearly described in an indictment; and if the

offense can not be so described with out expanding the allegations beyond the mere words of the statute, then it is clear that the allegations of the indictment must be expanded to that extent, as it is universally true that no indictment is sufficient which does not accurately and clearly allege all the ingredients of which the offense is composed so as to bring the accused within the true intent and meaning of the statute defining the offense."

U.S. v. Cruikshank, 92 U. S. pp. 542 to 569, 23 Law Ed., p. 595.

"In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute unless those words are in themselves fully, directly and expressly without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; and the fact that the statute in question read in the light of the common law and of other statutes on the like matter enables the court to infer the intent of the Legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent."

U. S. v. Carll, 105 U. S. 611.

"The settled rules governing here are that a crime should not be charged by way of inference but directly, the indictment should set forth accurately every ingredient of which the offense is composed; if the crime is made up of acts of intent they must be set forth with reasonable particularity, as to the time and place, the accused should be informed by that indictment as to the precise nature of the charge set forth

> against him to enable the court to say as to whether the facts set forth are sufficient in law to support a conviction, and the test is whether the indictment contains every element of the offense and sufficiently informs the defendant of what he must meet, and also whether it will enable him to sustain a plea of former acquittal or conviction."
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> *U. S. v. Dowling,* 278 Fed. 633.

The Government must content itself with the charge set forth in the indictment which is directed at the possession of drugs under certain circumstances. It can not inferentially or by intendment include in the charge other violations of the Act, as suggested by counsel for the Government in his argument before the District Court, without distinctly charging the defendant with those violations, *with a view that he may prepare his defense and plead the judgment as a bar to any subsequent prosecution for the same offense.*

As Section I of the "Harrison Anti-Narcotic Act", as amended, sets forth many requirements for violations of which many offenses are created, to convict or acquit the defendant of a violation of Section 8 of said Act by referring to other crimes by way of inference or intendment from the mere possession of said drugs would not preclude the Government from prosecuting him for those other offenses at a subsequent date. *He could not successfully urge a plea of once in jeopardy to the charge*

of "purchasing, selling, dispensing or distributing any of the drugs set forth in the indictment, which were not in the original stamped package or from the original stamped package", neither could he interpose such a plea if indicted subsequently for the offense of "being a person required to register under the provisions of the Act and having imported, manufactured, produced, compounded, sold, dealt in, dispensed, distributed, administered or given away any of the aforesaid drugs, without having registered and paid the special tax as provided by the Act." These violations constitute separate crimes in themselves, upon which separate indictments could be predicated. Manifestly therefore, the defendant was entitled to know upon his demand for information raised by his demurrer whether he was charged with a crime at all or the exact offense with which he was charged, so that upon his conviction or acquittal the Government would be stopped from ever trying him for that transaction again. To this effect are the following authorities:

U. S. v. Hess, 124 U. S. 483;
U. S. v. Carll, 105 U. S. 611 (supra);
U. S. v. Simmons, 96 U. S. 360;
U. S. v. Cruikshank, 92 U. S. 542 (supra);
Pierre v. U. S., 275 Fed. 352;
U. S. v. Dowling, 278 Fed. 633 (supra);
U. S. v. Robinson, 266 Fed. 240.

In the case of *U. S. v. Simmons,* 96 U. S., on page 362, the learned Justice had this to say:

> "Where an offense is purely statutory, having no relation to the common law, it is as a general rule sufficient in the indictment to charge the defendant with acts coming fully within the statutory description, in the substantial words of the statute. But to this general rule there is the qualification fundamental in the law of criminal procedure that the accused must be apprised by the indictment with reasonable certainty of the nature of the accusation against him, to the end that he may prepare his defense and plead the judgment as a bar to any subsequent prosecution."

At a much later date, the Circuit Court of Appeals of the Eighth Circuit, in the case of *Pierre v. U. S.,* 275 Fed. page 352 et seq., held:

> "An indictment to which the defendant is required to plead must set forth facts so distinctly as to enable the defendant to plead a former conviction or acquittal, if again indicted for the same offense, and upon such a plea that fact must appear from the face of the indictment (U. S. v. Hess, 124 U. S. 483). This indictment is defective in that respect. It fails to charge that the alleged threats were made to or in the presence of any person. If the defendant should again be indicted and the indictment charged to whom, or in the presence of what person or persons, the alleged threats were made, by the defendant, a plea of former acquittal or conviction, under this indictment, could not be sustained."

It follows, therefore, that upon the authority of the rulings in the cases of *Jin Fuey Moy,* 241 U. S. 394; *Pendleton v. U. S.,* 290 Fed. 388; *U. S. v. Wilson,* 225 Fed. 82; *U. S. v. Woods,* 224 Fed. 288, that the indictment against the plaintiff in error charges no crime at all and from the rulings in *U. S. v. Hess,* 124 U. S. 483; *U. S. v. Carll,* 105 U. S. 611; *U. S. v. Simmons,* 96 U. S. 360; *Dowling v. U. S.,* 278 Fed. 633, and the other cases cited, that the plaintiff in error can not be charged with other offenses by inference or intendment, when such offenses are not pleaded with such precision as to inform the plaintiff in error of the nature of the charge against him so that he may be protected in his rights; and the lower Court committed reversible error in overruling his demurrer, in denying his motion for a directed verdict, in denying his motion in arrest of judgment and in sentencing him to prison.

2.

THERE ARE TWO DISTINCT OFFENSES AGAINST TWO DISTINCT PERSONS IMPROPERLY JOINED IN AN INDICTMENT WHICH CONSISTS OF ONE COUNT.

The indictment improperly charges two distinct offenses against two distinct persons in one count. This point is raised by the demurrer interposed by the plaintiff in error which demurrer was ordered overruled and to which an assignment of error was duly made. (Trans. Rec. pages 65, 66.) And it

was also raised by plaintiff in error before judgment by his motion in arrest of judgment, to which an assignment of error was also made. (Trans. Rec. pages 70, 71.)

The indictment charges plaintiff in error and the defendant, Roy Croxall, on the date set forth therein, with knowingly, unlawfully and feloniously having in their possession a certain preparation and derivative of opium, to-wit, one can morphine and one finger stall containing approximately a total of 194 grains of morphine. To the indictment upon this point, plaintiff in error demurred and specified as his grounds of demurrer the following:

> 5. "That said indictment is uncertain in that it can not be ascertained therefrom whether the defendants had joint possession of the narcotics mentioned in the indictment or whether one defendant had possession of one can of morphine and the other defendant had possession of the finger stall containing the morphine mentioned in said indictment."
>
> 6. "That said indictment is uncertain in that it can not be ascertained therefrom whether the defendants, or either of them, are charged with possessing the narcotics mentioned in said indictment at the same time."
>
> 7. "That said indictment is uncertain in that it can not be ascertained therefrom whether the Government charges one offense against the defendants or whether the Government is attempting to charge the defendants with two offenses in one count."
>
> 8. "That said indictment is uncertain in that it can not be ascertained therefrom what con-

> nection, if any, the defendants had with each other, whether one was the agent of the other, or whether each was acting independent of the other, or whether they were acting under a partnership agreement."
>
> (Trans. Rec. pages 8, 66.)

The lower Court overruled said demurrer. (Trans. Rec. page 10.) Upon the trial of the cause no connection was established between the plaintiff in error and the possession of the finger stall containing morphine, and the lower Court properly sustained the objection of the plaintiff in error to the introduction in evidence of the finger stall containing morphine, upon the ground that no connection had been shown between the plaintiff in error and the finger stall (Bill of Exceptions, Trans. Rec. page 37), nevertheless, the lower Court permitted the jury to return the following verdict:

> "We, the jury, find as to the defendant at the bar as follows: Gustave Johnson, guilty as charged" (Trans. Rec. page 15),

though the point had again been called to the attention of the lower Court upon the conclusion of the Government's case by the motion of plaintiff in error for a directed verdict of not guilty upon the ground that the evidence was insufficient to connect the defendant with the finger stall of morphine. (Bill of Exceptions, Trans. Rec. page 43.)

Section 1024 of the Revised Statutes does not authorize the charging of separate offenses in a

single count of an indictment and by its silence forbids such a course. Said section is as follows:

> "When there are several charges against *any person* for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in *separate counts;* and if two or more indictments are found in such cases the Court may order them to be consolidated."
>
> Sec. 1428, *Barnes' Fed. Code* (1919), page 323.

Plaintiff in error, by his demurrer in virtue of his rights guaranteed him by the Sixth Amendment to the United States Constitution, demanded of the lower Court, whether he was charged with possessing the finger stall containing the morphine, whether he was charged with jointly possessing it with the co-defendant, and whether two offenses were not being set forth in one count; in other words, plaintiff in error did everything legally permissible to avert the result which was brought about by the jury's verdict, to-wit, his conviction of possessing the finger stall containing morphine, which was found on the person of the other defendant and which admittedly plaintiff in error did not possess. We respectfully submit that the lower Court erred in overruling the demurrer of the plaintiff in error and his motion in arrest of judgment.

It has been held that different charges of crime must be stated in different counts and that the joinder of separate offenses, where the parties are not the same and where the offenses are in no wise part of the same transaction, can not be set forth in the same indictment.

U. S. v. McElroy, 164 U. S. 81;
Coco v. U. S., 289 Fed. 33;
U. S. v. Hopkins, 290 Fed. 619;
U. S. v. Deitrich, 126 Fed. 664, 671.

> "While the general rule is that counts for several felonies of the same general nature require the same mode of trial and punishment, may be joined in the same indictment, subject to the power of the court to quash the indictment or compel an election, such joinder can not be sustained, where the parties are not the same and where the offenses are in no wise parts of the same transaction and must depend upon evidence of a different state of facts as to each or some of them."
>
> *U. S. v. McElroy,* 164 U. S. 81.

Justice Van Devanter, in the case of *United States v. Deitrich,* 126 Fed. 671, says:

> "While the statement of the acts of the defendants in this regard is such as to show that they were several, both offenses are improperly charged in a single count. * * * It seems to us that material inconvenience and embarrassment will properly arise from the trial of the defendants upon this indictment. The general rule that two or more defendants can not be severally charged in the same indictment with dis-

> tinct and several offenses is well recognized, and under the circumstances recited, the practice to which we have referred, even if here sustained, would not save this indictment from rejection."

And, just lately, it was held in the case of *U. S. v. Hopkins,* 290 Fed. 621:

> "The demurrer challenges the indictment on the ground that it is multifarious. I think the objection is well taken. As I understand the law different charges of crime must be stated in different counts. I do not understand, that different offenses, although similar in their nature may be charged in the same count."

Thus, according to the authorities, we respectfully submit that the lower Court erred in trying the plaintiff in error upon an indictment in which the offense of another man committed at a different time and under different circumstances, and which would require a different statement of facts to convict, was linked with the alleged offense against the plaintiff in error, in one count of the indictment, and it is not illogical to assume that the plea of guilty of the defendant, Croxall (Trans. Rec. page 6), to the indictment embarrassed plaintiff in error in his trial before the jury.

3.

THE EVIDENCE WAS INSUFFICIENT TO CONVICT THE DEFENDANT.

The evidence was insufficient to convict the plaintiff in error and no crime was proven against him. This point is raised by plaintiff in error by his motion for a directed verdict of not guilty on the ground that the evidence was insufficient to substantiate the charge, made at the conclusion of the Government's case and again at the conclusion of all the testimony taken in the case (Bill of Exceptions, Trans. Rec. pages 43, 50), to which assignments of error were made (Trans. Rec. page 68), and said point is duly and regularly before this Court.

In the first place, there is not the slightest evidence that the plaintiff in error is an importer, manufacturer, producer, compounder, seller, dealer in, dispenser or one who gives away the narcotics mentioned in the indictment.

The facts of the case as presented by the evidence are these: On March 23, 1923, the plaintiff in error and Roy Croxall, a co-defendant were arrested on suspicion of theft by Police Officers of the San Francisco Police, and were brought to the Detective Bureau of the Police Department of the City and County of San Francisco for investigation. Two San Francisco police detectives, without the authorization of a search warrant, went to the home of the plaintiff in error and Roy Croxall at 882 Fulton

Street, San Francisco, California, in company with the plaintiff in error and Roy Croxall, who were still under arrest, and proceeded to search the premises for stolen goods. They found nothing in the premises to connect the plaintiff in error and the defendant, Croxall, with the larceny charge, but while in the said premises the police procured a key from the plaintiff in error to his trunk, which plaintiff in error said contained clothes. They obtained the key and opened the trunk. In the top drawer of the trunk, one of the police officers found an ounce can which contained a quantity of morphine. At the time, the plaintiff in error admitted that the can of morphine belonged to him and in another room in the premises, the officers found an empty can, which had once contained morphine, which the plaintiff in error admitted was his, and that he had used it and had bought it up north. The police did not see any revenue stamps on either can. In another room in the house a number of needles were found. In the room occupied by Croxall the plaintiff in error pointed out the place where the needle and syringe could be found. At the time the can of morphine was found the plaintiff in error said he was a user of narcotics and asked the permission of one of the officers to take a "shot" of morphine. Plaintiff in error and the defendant Croxall were taken to the City Prison and booked for violating the State Poison Law.

The police afterwards turned the evidence over to the Government. When the defendant, Croxall was searched, at the City Prison, the finger stall of morphine was found on him. No connection was shown between the plaintiff in error and the possession of the finger stall of morphine found on Croxall, and the Court properly sustained an objection made by plaintiff in error to the introduction in evidence of the finger stall of morphine. (Bill of Exceptions, Trans. Rec. page 37.) *Upon the witness stand, both police officers admitted that they had no information that the plaintiff in error was engaged in the traffic of narcotics* (Bill of Exceptions, Trans. Rec. pages 30, 33, 41, 42), and there was no other evidence offered by the Government that he imported, manufactured, produced, compounded, sold, dealt in, dispensed or gave away the narcotics mentioned in the indictment. At the conclusion of the Government's case, plaintiff in error moved the Court for a directed verdict of not guilty, upon the ground that the evidence was insufficient to convict the defendant. The lower Court denied said motion.

We respectfully submit, that the lower Court erred in denying this motion. The testimony of the police officers (cited supra) that they had no information that plaintiff in error was engaged in the traffic of narcotics nullified any effect which might be given to the questionable presumption set forth in Section 8 of the Act of December 17, 1914, and the evidence

adduced by the Government was not sufficient to constitute a crime.

U. S. v. Jin Fuey Moy, 241 U. S. 394;
Pendleton v. U. S., 290 Fed. 388, 389;
U. S. v. Wilson, 225 Fed. 82, 84;
U. S. v. Woods, 224 Fed. 278, 280.

Upon the denial of the motion above mentioned, the plaintiff in error took the witness stand and testified that he was addicted to the use of narcotics and had been so addicted since the year 1908; *that he had the narcotics which were found in his home at 882 Fulton Street, San Francisco, California, in his possession for his own use; that he had never imported any narcotics into the country; that he had never manufactured any narcotics; that he had never produced any narcotics; that he had never compounded any narcotics; that he had never sold any narcotics; that he had never dealt in any narcotics; that he had never dispensed any narcotics and that he had never given any narcotics away.* (Bill of Exceptions, Trans. Rec. pages 43, 44, 47, 48.) The Government was not able to disturb his testimony in a single particular, it did not offer any evidence in rebuttal, and it did not show by legal evidence or hearsay anything more than that a can containing a quantity of narcotics was found in his possession at his home, that he was addicted to the use of narcotics and that the can in which the narcotics were found bore no stamps. At the conclusion

of all the testimony, plaintiff in error again moved the Court for a directed verdict of not guilty upon the ground that the evidence was insufficient to convict the defendant and pointed out *that there was no evidence that the defendant was a person required to register because he was not an importer, nor a manufacturer, nor a producer, nor a compounder, nor a seller, nor a dealer in, nor a dispenser, nor one who gives away the narcotics found in his possession and set forth in the indictment* and particularly called the lower Court's attention to the case of *Jin Fuey Moy,* 241 U. S. 394. But the lower Court denied said motion and we believe therein committed reversible error.

It has been held that Section 8 of the Act of December 17, 1914, which has not been altered by any subsequent act of Congress, does not apply to any person in the United States, but must be taken to refer to the class with which the statute undertakes to deal,—the persons who are required to register by Section I, namely, any person who imports, manufactures, produces, compounds, sells, deals in, dispenses or gives away opium or coca leaves, their compounds, manufactures, salts, derivatives or preparations.

U. S. v. Jin Fuey Moy, 241 U. S. 394;
Pendleton v. U. S., 290 Fed. 388, 389;
U. S. v. Wilson, 225 Fed. 82, 84;
U. S. v. Woods, 224 Fed. 278, 280.

The four cases last cited bear directly upon the point involved. In analyzing them it should be borne in mind that they are directed particularly to Section 8, of the Act of December 17, 1914, under which the instant indictment was drawn, though it is true that the indictment charges plaintiff in error with violating the Act of December 17, 1914, as amended February 24, 1919, but the Act of February 24, 1919, does not touch Section 8 at all. *U. S. v. Jin Fuey Moy,* 241 U. S. 394, *is unequivocal in its condemnation of prosecutions, such as this. Pendleton v. U. S.,* 290 Fed. 388, 389, says that an indictment, such as the one under consideration, charges no offense, having been obviously drawn under the original Anti-Narcotic Act, which the Supreme Court held did not penalize the mere possession of drugs. *U. S. v. Woods,* 224 Fed. 278, and *U. S. v. Wilson,* 225 Fed 82, discusses the exact points involved here and are as follows:

> "Having in mind that taxes can be imposed and statutory offenses created only by direct, clear, and apt language, it seems clear that there is nothing in the Act imposing the duty of registration and payment of taxes upon mere consumers of the drugs. They are not within Section 1 and Section 8 does not purport to extend the registration and taxation features of the Act to them, or to any one, only to make unlawful mere possession of the drugs by any person of the class of Section 1 required to register and pay, and who have not, and to create a statutory rule of evidence."
>
> *U. S. v. Woods,* 224 Fed. 278, 280.

In the case of *U. S. v. Wilson,* 225 Fed. 82, the facts were,

> "that the defendant had at her house, in her possession and under her control, an opium pipe and an outfit necessary for smoking purposes, including a small quantity of opium prepared for the pipe. The defendant testified that she had for several years been an addict to opium smoking, and that the opium was obtained from a Chinaman, and that she had it for her own personal use and consumption. That she never sold, gave away nor dealt in it in form, except to buy it and smoke it. The evidence was uncontradicted and the question arose whether it is an offense under the Act for a person to have in his or her possession any of the drugs named in the Act for her personal use."

The Court said:

> "If it is an offense, Congress has not in turn so declared and it must be worked out by a construction of the language of the Act. It is a criminal statute and must be strictly construed."

And, further on in the same decision, the Court says:

> "The question arises to whom does the clause 'any person not registered under the provisions of the Act', and 'who has not paid the special tax', in the Eighth Section refer? Clearly it refers to and at least included those things specifically named in the First Section. Does it refer to and include others doing things not specifically named in the Act, having in their

possession or under their control the drugs named for their personal consumption?

"It seems to me that to so hold would be for the Court to enlarge the list of those whom Congress required to register and pay the special tax. To that extent it would be an amendment of the Act. This is not the function of the Court."

If the evidence was as consistent with the defendant's innocence as with his guilt he was entitled to binding instructions and it has been so held in the case of *Weiner v. U. S.*, 282 Fed. 799, wherein the Court says:

"If the evidence is as consistent with the theory that opium was stolen, as it is with the theory that it was not stolen, the motion for binding instructions, for the reasons that the allegations in the indictment had not been proved, should have been granted and the defendants' first point that they could not be convicted under the evidence in the case should be affirmed."

In the present case, the defendant proved that he was not of the class required to register under the provisions of the Act set forth in the indictment. The Government introduced no evidence in rebuttal of the defendant's testimony, no facts in contravention thereof, but contented itself with a questionable rule of evidence set forth in the statute. The theory of the defendant's guilt was inconsistent with the evidence and the defendant whose guilt must be proven beyond a reasonable doubt was convicted

from the mere fact that he had drugs in his possession, which he had satisfactorily explained. Such conviction was unjustified and was erroneous and we respectfully submit that it should be reversed.

There was no proof at all that the plaintiff in error possessed or was in any manner connected with the possession of the finger stall containing the morphine mentioned in the indictment and found on the person of the other defendant, but the verdict did not differentiate upon which possession the conviction was predicated, but found the defendant guilty of everything contained in the indictment. This, too, was erroneous, unjustified in fact for the record unquestionably shows that the possession of the finger stall containing the morphine was a separate and distinct offense, committed by a separate and distinct person, at a different time and which would require different testimony to convict.

This conviction upon the indictment objected to as above set forth in the second subdivision of this argument is condemned by the following authorities, cited heretofore:

U. S. v. McElroy, 164 U. S. 76;
U. S. v. Hopkins, 290 Fed. 619;
Coco v. U. S., 289 Fed. 33;
U. S. v. Deitrich, 126 Fed. 671.

4.

THERE WAS ERROR COMMITTED IN THE COURT'S REFUSAL TO GIVE CERTAIN INSTRUCTIONS.

We respectfully submit that the trial Court erred in refusing to give, at the request of the defendant, the instructions set forth in paragraphs 5, 6, and 7 of specifications of error contained in this brief and contained in plaintiff in error's bill of exceptions (Trans. Rec. pages 55, 56), to which assignments of error were duly made. (Trans. Rec. pages 68, 69, 70.)

The plaintiff in error requested the following instructions:

> "You are instructed that if you find from the evidence that the defendant, Gustave Johnson, was merely a consumer, a user, or an addict to the use of narcotics and had the narcotics mentioned in the indictment in his possession for his own use and did not import, manufacture, produce, compound, sell, deal in, dispense or give away opium or coca leaves, or any compound, manufacture, salt, derivative, or preparation thereof, then he was a person not required to register under the provisions of the Act and you must return a verdict of not guilty."
>
> "You are instructed that there is no presumption of law created in the Act of December 17, 1914, as amended February 24, 1919, which is superior to or overcomes the presumption of innocence with which the defendant is clothed from the time of his arrest to the end of the jury's deliberations."
>
> "It is not necessary under any law for the defendant to prove his innocence but the burden rests upon the prosecution to establish every

element of the crime with which he is charged and every element of the crime must be established to a moral certainty and beyond all reasonable doubt. If the prosecution failed to establish to a moral certainty that the defendant was a person required to register and did not register under the provisions of the Act for the possession of the narcotics mentioned in the indictment then it is your duty to acquit the defendant. If the prosecution failed to establish to a moral certainty and beyond all reasonable doubt that the defendant had not paid the tax required for the possession of said narcotics then it is your duty to acquit the defendant."

These instructions, the Court refused to give and in lieu thereof gave the following:

"The statute under which this indictment is brought makes it a crime for any person to have morphine in his possession, except certain persons who have registered and paid the tax. The statute also provided that the possession of morphine is prima facie evidence that he has not registered and has not paid the tax. Therefore, if the Government has established to your satisfaction that the defendant did have this morphine in his possession, then it was incumbent upon the defendant to overcome that prima facie showing by proving that he had registered and had paid the tax. He has offered no such evidence in this case, and there is no pretense of any such thing."

"The presumption of innocence which attaches to every person charged with a crime follows at all deliberations and all stages of the case until it is finally determined by the whole twelve of the jury. This defendant, like all defendants, is entitled to that presumption. The Government, in order to overcome that presump-

tion of innocence, must establish the possession of morphine by this defendant beyond a reasonable doubt."

(Trans. Rec. page 54.)

Assuming that the indictment states a public offense, the Government must prove three essential elements which constitute the crime,

(a) They must prove that the defendant was a person required to register and pay a tax;

(b) They must prove that the defendant possessed narcotics;

(c) They must prove that the defendant had not registered and had not paid a tax, for the possession of the narcotics.

We submit that in giving the foregoing instructions and refusing those requested by plaintiff in error that the lower Court refused to place before the jury, for its deliberation, the crux of the crime, that he was a person required to register.

It has been held that if plaintiff in error was not an importer, producer, manufacturer, compounder, seller, dealer in, dispenser or one who gives away the narcotics set forth in the indictment, he was not a person required to register, and was therefore not a person amenable to the provisions of the acts with which the defendant was charged.

U. S. v. Jin Fuey Moy, 241 U. S. 394;
Pendleton v. U. S., 290 Fed. 388, 389;
U. S. v. Wilson, 225 Fed. 82;
U. S. v. Woods, 224 Fed. 278, 280.

And, it has also been held that mere consumers, users, or addicts, as such, who do not import, manufacture, compound, sell, deal in, dispense or give away opium or coca leaves or any of their compounds, manufactures, salts, derivatives or preparations do not have to register and do not have to pay a tax, under Section 8 of the Act of December 17, 1914, or as the Government claims as amended February 24, 1919.

U. S. v. Jin Fuey Moy, 241 U. S. 394;
Pendleton v. U. S., 290 Fed. 388, 389;
U. S. v. Wilson, 225 Fed. 82;
U. S. v. Woods, 224 Fed. 278, 280.

It is a settled rule of law that every ingredient of the crime, with which the defendant is charged must be proved to the satisfaction of the jury, beyond a reasonable doubt. And the lower Court in refusing to permit the jury to pass upon the question whether or not the defendant was a person required to register and limiting the province of the jury to determine the guilt or innocence of the defendant upon the mere possession of the narcotics, committed reversible error.

It has been held that where the evidence presents a theory of defense and the court's attention is directed particularly to it, as it was in plaintiff in error's requested instructions referred to above, it is reversible error to refuse to give any charge on such theory.

U. S. v. Bird, 180 U. S. 356;
Calderon v. U. S., 279 Fed. 556;

Hendrey v. U. S., 233 Fed. 5;
Fredericks v. U. S., Unreported 9th Circuit files 4023.

The Court suppressed evidence in refusing to give plaintiff in error's requested instruction as set forth in his sixth specification of error.

Said instruction is as follows:

> "You are instructed that there is no presumption of law created in the Act of December 17, 1914, as amended February 24, 1919, which is superior to or overcomes the presumption of innocence with which the defendant is clothed from the time of his arrest to the end of the jury's deliberations."

And it was held so in substance in
Coffin v. U. S., 156 U. S. 432;
Cochrane & Sayre v. U. S., 157 U. S. 286;
Weiner v. U. S., 282 Fed. 799.

Justice White, in the case of *U. S. v. Coffin,* 156 U. S. 460, says:

> "The fact that the presumption of innocence is recognized as a presumption of law and is characterized by the civilians as a presumptio juris, demonstrates that it is legal evidence in favor of the accused. For in all systems of law legal presumptions are treated as evidence giving rise to resulting proof to the full extent of their legal efficacy." * * * "To say that the one is equivalent of the other (Doctrine of Reasonable Doubt) is therefore to say that legal evidence can be excluded from the jury and that such exclusion may be cured by instructing them correctly in regard to the method

by which they are required to reach their conclusion upon the proof actually before them."

It has also been held that a prima facie case does not take away from a defendant the presumption of innocence.

Lawson on Presumptions, Second Edition, p. 523;

U. S. v. Douglass, 2 Blatchf. (U. S.) 207;

Commonwealth v. Dana, 2 Metc. (Mass.) 329;

Commonwealth v. Kimball, 24 Pick. 373;

State v. Flye, 26 Me. 312;

State v. Tibbetts, 35 Me. 81;

People v. Bodine, 1 Den. (N. Y.) 281.

In the case of *Commonwealth v. Kimball,* 24 Pick 373, and quoted in *Lawson on Presumptions,* 523, et seq., the Court says:

"A prima facie case is that amount of evidence which would be sufficient to counterbalance the general presumption of innocence and warrant a conviction if not controlled by evidence tending to contradict it or render it improbable or to prove other facts inconsistent with it. But the establishment of a prima facie case does not take away from the defendant the presumption of innocence, though it may in the opinion of the jury, be such as to rebut and control it; but that presumption remains, in aid of any other proof offered by the defendant, to rebut the prosecutor's prima facie case. The court are of the opinion that the jury should have been instructed that the burden of proof was upon the commonwealth to prove the guilt of the defendant,—that he was

presumed to be innocent unless the whole evidence in the case satisfied them that he was guilty."

Assuming that Section 8 of the "Harrison Anti-Narcotic Act" creates a presumption that Section 8 is violated from the mere possession of narcotics, that presumption, in the instant case, was surely rebutted when the defendant took the stand and denied that he was a person required to register; denied that he was an importer, manufacturer, producer, compounder, seller, dealer in, dispenser, or one who gives away the narcotics set forth in the indictment.

The presumption of innocence is evidence in favor of the defendant and is not only evidence of his innocence of one element of the crime but of each and every element of the offense and of the offense itself.

It follows therefore, that under the instructions given by the Court, and the Court's refusal to give those instructions requested by the plaintiff in error that the jury convicted the defendant from the mere fact that he possessed the narcotics without passing upon the other ingredients of the crime as set forth in the indictment.

CONCLUSION.

It is respectfully submitted that for the reasons stated in this brief, to-wit, (1) The insufficiency of

the indictment to charge a crime; (2) The improper joinder of two different crimes against two distinct persons in an indictment consisting of one count; (3) The insufficiency of the evidence to support a conviction; (4) The Court's refusal to properly instruct the jury on questions of law pertaining to the case, the judgment should be reversed.

Dated, San Francisco,
October 17, 1923.

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